Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

RICHARD I. BERGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Ninth Circuit erred when it held that the deprivation of the right to counsel during the giving of an *Allen* supplemental jury instruction — a critical stage of a trial — is subject to harmless error analysis, thereby creating a three-way Circuit split and sharply departing from this Court's Sixth Amendment jurisprudence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-59a) is reported at 473 F.3d 1080.

JURISDICTION

The Court of Appeals entered its judgment on January 18, 2007. The court denied a petition for panel and *en banc* rehearing on June 11, 2007. (Pet. App. 60a-61a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

STATEMENT

This petition presents the sole issue of whether the deprivation of the right to counsel during the giving of an *Allen* supplemental jury instruction — a critical stage of a trial — can ever been deemed harmless. Despite the well-established principle articulated by this Court that, in asserting a Sixth Amendment deprivation of counsel claim, a defendant need not show prejudice "when counsel was either totally absent, or prevented from assisting the accused

during a critical stage of the proceeding," *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (emphasis added), a three-way split among the Circuits has developed concerning the proper standard for analyzing such a claim. The First, Second, Fifth, Sixth, Eighth and Eleventh Circuits, following *Cronic* and its progeny, have held that that the deprivation of counsel at any critical stage is a structural error requiring automatic reversal. The Third, Fourth, Seventh, Tenth and D.C. Circuits, in contrast, have held that there is structural error only when the deprivation of the right to counsel at a critical stage "affected and contaminated the entire criminal proceeding." The Ninth Circuit, standing alone, held in Petitioner Richard I. Berger's case that the deprivation of the right to counsel at a critical stage of a trial can be deemed harmless. This holding not only conflicts directly with the decisions of every other Circuit, but sharply departs from this Court's Sixth Amendment jurisprudence. Because the issue is both important and recurring, and because only this Court can resolve the split among the Circuits, review is plainly warranted.

A. *Factual Background.*

The relevant facts, as determined by the lower court, are these:

Petitioner, Richard I. Berger, was convicted of twelve counts of loan fraud, falsifying corporate books, conspiracy and various securities fraud violations in connection with a revolving credit line that Craig Consumer Electronics[1] maintained with a consortium of banks. Pet. App. at 2a-3a.

[1] Craig Consumer Electronics was a publicly traded consumer electronics wholesaler, in business since 1968. Mr. Berger was Craig's President, Chief Executive Officer and Chairman of the Board. Pet. App. at 3a.

On the fourth day of jury deliberations in Mr. Berger's trial, several jurors alerted the court to scheduling problems with deliberating the following week. The district court judge convened the parties and their counsel and informed them that there had been some emotional outbursts in the jury room. The judge then proposed that he meet informally with the jury, without the presence of counsel or Mr. Berger, to discuss scheduling issues and to give the jury a pep talk. *Id.* at 8a. Defense counsel objected to the giving of any type of *Allen* instruction and the government expressed similar concern. In response, the judge assured the parties, "I want the record to indicate that I do not believe in the *Allen* instruction, I will not give it, never have given it." *Id.*

Mr. Berger's counsel then requested a preview from the judge regarding what the judge intended to say to the jurors during the proposed "informal meeting." *Id.* at 9a. The judge explained:

> "I was planning to address the issue, first of all, regarding the jury request for days off.
>
> . . . . [Second,] I want to make certain that I can convey to them the thought that a rush to judgment is probably the worst form of verdict you could receive."

Id.

After hearing the judge's preview, Mr. Berger agreed to waive his right to be present and his counsel's right to be present "for the particular communication that [the court] anticipate[d] having with the jury," which, based on the judge's representation, would *not* include an *Allen*

instruction. *Id.* at 10a. The judge accepted this expressly limited waiver. *Id.*

Despite the earlier assurances, however, the judge departed from the script outlined for Mr. Berger and his counsel. The departure occurred in response to one juror's statement that:

> There won't be a resolution to a lot. There's some of us that are dead set on our verdicts and others that are dead set. You could probably leave us in here a hundred years and we've deliberated, we've gone over it and my vote will not change.

Id. at 12a.

The judge stated that if the juror's position was sincere, there was not much more the judge could ask for. When the judge began scheduling days for more deliberations in the upcoming week, two jurors then said they would "jump out this window" if deliberations continued that long. *Id.* at 13a. The judge responded by giving the jury an *Allen* instruction:

> One thing I would like to comment on. I don't know if I should or not, but with respect to those of you who reached a particular conclusion, and that you will not change your minds. *It wouldn't be wrong for you to reconsider your position if you can be convinced that perhaps your position was not accurate, that it could be wrong.*
>
> And you have to have that state of mind throughout the deliberations. *Otherwise, it's going*

> *to be like the Hatfields fighting the McCoys*. It's not going to be promotive of a final conclusion. As long as you understand that.

Id. at 13a-14a (emphasis added).

Upon returning to the courtroom, the judge confessed that he may have gone "beyond the script." *Id.* at 14a. After reviewing the transcript, Mr. Berger moved for a mistrial, arguing that the district court's final comments to the jury misstated the burden of proof and "'took the worst part of the *Allen* charge' without the balancing language." *Id.* The district court denied the motion. *Id.* The judge reinstructed the jurors on the burden of proof. He then excused the jurors for the day. *Id.* at 14a-15a.

The next day the jurors reported that they had reached a verdict on 12 counts against Mr. Berger, but could not reach a verdict as to any of the remaining 24 counts. *Id.* at 15a. The district court subsequently dismissed all remaining counts against Berger. *Id.*

Mr. Berger timely appealed his conviction to the Ninth Circuit, arguing, among other things, that the district court's supplemental *Allen* instruction to the jury was a "critical stage" of trial, and that conducting such proceedings outside the presence of Mr. Berger's counsel violated Mr. Berger's Sixth Amendment right to counsel.[2]

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[2] Mr. Berger also argued that the district court's supplemental *Allen* charge violated Mr. Berger's Fifth Amendment due process right to be present at every critical stage of trial.

B. *The Lower Court's Ruling.*

The Ninth Circuit held that the giving of the supplemental *Allen* instruction "outside the presence of Berger *and his counsel*" "impinged [Berger's] due process right to be present at every critical stage of trial." *Id.* at 27a (emphasis added). The court then analyzed the violation of Mr. Berger's Fifth Amendment due process right to be present at critical stages of trial under the *Chapman v. California*, 386 U.S. 18 (1967), harmless error analysis. *Id.*

Despite the fact that Mr. Berger had expressly and extensively argued on appeal that there were violations *both* of his constitutional right under the Fifth Amendment's due process guarantee to be present when supplemental instructions are given to the jury *and* of his *separate* Sixth Amendment right to have counsel present, the Ninth Circuit treated the latter issue as though it were wholly subsumed within, and governed by, the Fifth Amendment due process standard applicable to the defendant's absence from the proceedings. Accordingly, the Ninth Circuit erroneously held that the violation of Mr. Berger's Sixth Amendment right to counsel at a critical stage of the proceedings could be deemed harmless. This holding conflicts with this Court's authority and with every other Circuit.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE THREE-WAY SPLIT OF AUTHORITY OVER WHETHER THE DEPRIVATION OF THE RIGHT TO COUNSEL DURING A CRITICAL STAGE OF A TRIAL IS SUBJECT TO STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL.

Prior to the Ninth Circuit's decision in this case, there was a two-way split among the Circuits regarding the appropriate standard to apply to a Sixth Amendment claim of the deprivation of the right to counsel at a critical stage of a trial. The majority position, followed by six Circuits —the First, Second, Fifth, Sixth, Eighth and Eleventh — is that that the deprivation of counsel at any critical stage is a structural error requiring automatic reversal. In so holding, these Circuits relied upon the well-established principle articulated by this Court that a defendant asserting a Sixth Amendment deprivation of counsel claim need not show prejudice "when counsel was either totally absent, or [was] prevented from assisting the accused *during a critical stage* of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (emphasis added). *See also United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564-65 (2006) (holding that "the denial of counsel" is a "structural defect," to which harmless-error analysis was inapplicable); *Bell v. Cone*, 535 U.S. 685, 695-96 (2002) ("A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at a critical stage. . . ."); *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) ("The existence of [structural] defects — deprivation of the right to counsel, for example — requires automatic reversal of the conviction because they infect the entire trial process."); *Penson v. Ohio*, 488 U.S.

75, 88, (1988) ("the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" (alteration in original; citation omitted); *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) ("[W]hen a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic."); *Geders v. United States*, 425 U.S. 80, 91 (1976) (reversing conviction without conducting harmless-error analysis where defendant was prevented from conferring with counsel during overnight recess); *Herring v. New York*, 422 U.S. 853, 865 (1975) (reversing conviction without conducting harmless-error analysis where defense counsel was prevented from giving closing statement in a bench trial); *White v. Maryland*, 373 U.S. 59, 60 (1963) ("we do not stop to determine whether prejudice resulted" where defendant was deprived of counsel at a preliminary hearing); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) ("the degree of prejudice can never be known" where defendants are deprived of counsel during arraignments and thus no showing of prejudice is required for reversal).

Accordingly, the threshold question for analyzing a deprivation of counsel claim under the majority approach is whether the defendant was deprived of counsel throughout the entire prosecution or during any critical stage of the prosecution. If a court finds that the defendant was deprived of counsel in either situation, these Circuits hold that there is per se reversible error.

For example, the First and Sixth Circuits, under identical circumstances to Mr. Berger's situation, held that "a supplemental jury instruction is a 'critical stage' of a criminal proceeding" and the "absence of counsel during a

critical stage of a trial is per se reversible error." *French v. Jones*, 332 F.3d 430, 436, 438 (6th 2003); *Curtis v. Duval*, 124 F.3d 1, 4-5 (1st Cir. 1997) ("supplementary instructions after deliberations are underway is a critical stage of a criminal trial" and "denial of counsel at a critical stage of a criminal trial constitutes prejudice per se and thus invalidates a defendant's conviction"). The First Circuit recognized that when examining a Sixth Amendment violation of the deprivation of counsel at a critical stage, the deprivation may be brief (if the critical stage itself is brief), but still per se reversible because the deprivation occurred during a vital point in the criminal proceeding:

> "It is evident to us that giving a *sua sponte* jury instruction without consulting, and in the absence of the defendant's attorney, as occurred here, denies the defendant the assistance of counsel at that critical stage. And although this deprivation was short-lived, it occurred during a vital point in the trial and was, within its terms, total."

Id. at 4-5 (citation omitted).

The Sixth Circuit noted that the need to apply structural error to deprivations of counsel at a critical stage arises because the "right to counsel is so basic to a fair trial that [its] infraction can never be treated as harmless error," and the uncertainty of the prejudice that a defendant suffers because he or she was not represented by counsel during a critical stage of a trial itself makes the outcome of that trial unreliable. *French*, 332 F.3d at 438 (quoting *Penson v. Ohio*, 488 U.S. 75, 88 (1988)). Indeed, the inherent uncertainty of the prejudice that a defendant suffers as a result of being deprived of counsel was noted by this Court in its most recent

case examining the Sixth Amendment right to counsel, *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564-65 (2006). In *Gonzalez*, the Court held that the consequences of violating a defendant's Sixth Amendment right to counsel "'are necessarily unquantifiable and indeterminate'" and that "[h]armless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id. Gonzalez-Lopez* reaffirmed that the "the denial of counsel" is a "structural defect," to which harmless-error analysis is inapplicable. *Id.*

Like the First and Sixth Circuits, the Second, Fifth, Eight and Eleventh Circuits have followed the majority approach, and held that the deprivation of counsel at any critical stage is a structural error requiring automatic reversal. *Norde v. Keane*, 294 F.3d 401, 413 (2d Cir. 2002) (holding that "a defendant who claims denial of counsel at a critical stage in the proceedings need not show prejudice" and "need only demonstrate that he was actually or constructively denied his right to counsel, not that the denial prejudiced the outcome of his trial"); *Burdine v. Johnson*, 262 F.3d 336, 344-45 (5th Cir. 2001) (en banc) (holding that "the absence or denial of counsel at a critical stage of a criminal proceeding represents one of the egregious circumstances that requires the presumption of prejudice" and noting that "the Sixth Amendment principle animating . . . presumption of prejudice is the fundamental idea that a defendant must have the actual assistance of counsel at every stage of a criminal proceeding for the court's reliance on the fairness of that proceeding to be justified."); *United States v. White*, 341 F.3d 673, 677-78 (8th Cir. 2003) (noting that although courts have been "appropriately cautious in presuming prejudice," "[t]he Supreme court has repeatedly found constitutional error without any showing of prejudice when counsel was either

totally absent, or prevented from assisting the accused during a critical stage of the proceeding."); *United States v. Arbolaez*, 450 F.3d 1283, 1295 (11th Cir. 2006) ("structural error exists where counsel is 'prevented from assisting the accused during a critical stage of the proceeding'") (quoting *Cronic*).

In contrast to the majority position, five Circuits — the Third, Fourth, Seventh, Tenth and D.C. — hold that there is structural error only when the deprivation of the right to counsel at a critical stage "affected and contaminated" the entire criminal proceeding. *See Satterwhite v. Texas,* 486 U.S. 249, 257 (1988). In so holding, these Circuits purportedly rely on this Court's decision in *Satterwhite v. Texas,* where the Court explained that the determination of whether a Sixth Amendment violation requires automatic reversal turns on the extent to which the violation pervades the entire criminal proceeding. As the Court noted: "Some constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category." *Id.* at 256. The Court further noted that in previous cases requiring automatic reversal, "the deprivation of the right to counsel affected — and contaminated — the entire criminal proceeding." *Id.* at 257. Accordingly, unlike the majority approach, which examines as a threshold issue whether the defendant was deprived of counsel throughout the entire prosecution or during a critical stage of the prosecution, the threshold question under the minority approach is whether defendant's deprivation of counsel "affected and contaminated the entire criminal proceeding." If a court finds that the deprivation pervaded the entire proceeding, these Circuits have held that there is per se reversible error.

For example, in *United States v. Klat*, 156 F.3d 1258, 1264 (D.C. Cir. 1998), the D.C. Circuit, although noting that a competency hearing was a *critical stage* of trial, remanded the case to the district court to determine whether the deprivation of counsel at the critical stage "affected and contaminated the entire criminal proceeding," thus requiring automatic reversal, or whether the effects of the deprivation were "confined to the competency hearing." This approach stands in sharp contrast to the majority approach (outlined above), which would end its inquiry upon holding that the deprivation of counsel occurred at a critical stage.

This minority approach has also been adopted by the Third, Fourth, Seventh and Tenth Circuits. *See Henderson v. Frank*, 155 F.3d 159, 171 (3d Cir. 1998) ("Violations of the right to counsel may not always be structural defects which allow a reviewing court to bypass harmless error analysis, but harmless error analysis should never be applied where, as here, 'deprivation of the right to counsel affected-and contaminated-the entire criminal proceeding'") (internal citations omitted); *United States v. Owen*, 407 F.3d 222, 227 (4th Cir. 2005) (holding that defendant's deprivation of counsel during his arraignment, where defendant "merely entered a plea of not guilty and asserted his right to a jury trial . . . [and] did not irrevocably waive any defenses or make any irreversible admissions of guilt," was not a structural error requiring automatic reversal because it did not contaminate the entire trial process); *Sanders v. Lane*, 861 F.2d 1033, 1040 (7th Cir. 1988) (holding that the trial court's refusal to allow defendant to consult with his attorney during a court-ordered recess prior to the conclusion of defendant's testimony was not structural error requiring automatic reversal because it did not contaminate the entire proceedings, as counsel was given the opportunity to consult with

defendant at the conclusion of his testimony); *United States v. Lott*, 433 F.3d 718, 723 (10th Cir. 2006) (declining to find structural error where "nothing that occurred at [defendant's] evidentiary hearing contaminated [defendant's] entire criminal proceeding. [Defendant] has not identified any rights that he lost for failure to raise them at the hearing.").

This split alone is sufficient to warrant review by this Court: the majority approach faithfully applies *Cronic* and numerous other holdings of this Court, while the minority approach fails to recognize that a deprivation of counsel during a critical stage must necessarily affect and contaminate the entire criminal proceeding, because a critical stage is defined as a stage that "affect[s] the whole trial," *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961), and where rights "are preserved or lost," *White v. Maryland*, 373 U.S. 59, 60 (1963). Therefore, Circuits following the minority approach may inappropriately hold that a specific deprivation of counsel during a *critical stage* does not amount to structural error, although this Court's well-established precedent demands a contrary holding.

The Ninth Circuit's decision in Mr. Berger's case further splinters the Circuits on the issue of the proper standard for analyzing the deprivation of the right to counsel at a critical stage of a trial. Standing alone, in conflict with the decisions of every other Circuit, the Ninth Circuit holds that the deprivation of the right to *counsel* at a critical stage of a trial can be subsumed entirely within the separate and distinct question — subject to harmless error analysis — of the deprivation of a *defendant's* Fifth Amendment due process right to be present at a critical stage of a trial. Pet. App. at 23a. This decision creates a three-way Circuit split that renders the Sixth Amendment right of counsel at a critical

stage of the proceeding entirely dependent on a particular defendant's geographic location rather than on this Court's reading of the Constitution. Because only this Court can resolve the current disarray among the Circuits surrounding this issue, review is plainly warranted.

II. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENT.

Review is also warranted because the decision below sharply departs from this Court's precedent. This Court has recognized repeatedly that an accused's Sixth Amendment right to be represented by counsel is a fundamental component of our criminal justice system. *Cronic*, 466 U.S. at 653. Lawyers in criminal cases "are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Counsel's presence at a critical stage in the proceeding is essential because they are the means through which the other rights of the person on trial are secured. *Cronic*, 466 U.S. at 653.

As noted, given the paramount importance of counsel in safeguarding a defendant's constitutional rights, this Court has consistently held that the denial of counsel during a "critical stage" of a judicial proceeding mandates a presumption of prejudice, in part because "the degree of prejudice can never be known" when counsel is absent.[3]

[3] Indeed, the uncertainty of the prejudice a defendant suffers due to counsel's absence is particularly acute in the context of an *Allen* charge, as recognized by this Court in *United States v. United States Gypsum Company*, 438 U.S. 422, 462 (1978). In *Gypsum*, the Court held that where an *ex parte Allen*-type instruction is given to jurors it is "impossible" to disprove prejudice from this error. (Cont'd)

Hamilton v. Alabama, 368 U.S. at 55 (1961); *see also, Gonzalez-Lopez*, 126 S. Ct. at 2564-65; *Bell*, 535 U.S. at 695-96; *Brecht*, 507 U.S. at 629-30; *Penson*, 488 U.S. at 88; *Cronic*, 466 U.S. at 659 n.25; *Holloway*, 435 U.S. at 489; *Geders*, 425 U.S. at 91; *Herring*, 422 U.S. at 865; *White*, 373 U.S. at 60. In its decision below, however, the Ninth Circuit failed to follow this Court's Sixth Amendment jurisprudence regarding a *defendant's right to have counsel* present during a critical stage in a proceeding. Instead, it applied the wholly inapplicable harmless error standard for Fifth Amendment claims involving a *defendant's right* to be present during critical stages of the proceeding. In so doing, the Ninth Circuit now requires courts to examine whether defendants were prejudiced when deprived of counsel at a critical stage of trial, a task this Court has deemed impossible and unnecessary. Review is warranted to correct this misapplication of the law.

(Cont'd)

Counsel, if present during supplemental instructions, can object or help prevent judges from giving an *Allen* charge in the first instance or help shape the charge actually given. That opportunity would have been of exceptional value in Mr. Berger's case where the judge had already promised he would *not* give an *Allen* charge — and might, if reminded of his promise, have chosen not to give one at all. Counsel would certainly have shaped any such instruction quite differently. To determine the prejudice suffered by Mr. Berger's absence of counsel at such a critical and delicate stage of the proceedings would be merely speculation, thereby mandating a presumption of prejudice.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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